

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: BAIR HUGGER FORCED AIR
WARMING PRODUCT LIABILITY
LITIGATION

MDL No.: 15-md-02666 (JNE/DTS)

This Document Relates To:

BENJAMIN CRUME,

Civil Action No.: 17-cv-03617

Plaintiff,

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

NOW COMES Plaintiff, Benjamin Crume, identified in Defendants' Motion to Dismiss for Failure to Comply with Pretrial Order No. 23 [Dkt. 1621], and by and through undersigned counsel submits this, his Response to Defendants' Motion to Dismiss, and would respectively show the Court the following:

FACTS

In August of 2015, Mr. Benjamin Crume contacted undersigned counsel regarding an infection and subsequent treatment that he experienced due to the use of a Bair Hugger patient warming device during an orthopedic surgery. Counsel worked to obtain medical records and billing records to move forward with the case. Those records indicated that a Bair Hugger device was used during the original surgery. On August 8, 2017, counsel filed the current action to comply with what was identified as the applicable statute of limitations deadline for the relevant claim.

Efforts were made to follow up with Plaintiff to obtain information for the Plaintiff Fact Sheet (“PFS”) after the case was filed in August 2017 and continued for the next few months, but Mr. Crume was unable to be reached. A PFS was submitted soon after. Defendants issued a deficiency notice regarding the original PFS. Counsel for Plaintiff then submitted an amended PFS. This amended PFS was never challenged by Defendants pursuant to Pretrial Order 14.¹

Counsel was informed on December 3, 2018 that Mr. Crume had passed away. Counsel was unaware of Mr. Crume’s passing until that date. Mr. Crume, a veteran of the United States Army during the Vietnam War, was only 63 years of age at the time of this passing—his death was not necessarily expected. Mr. Crume was not married and did not provide an alternate contact or the identity of any next of kin at the time he initially contacted Kennedy Hodges to investigate the claim. Counsel also performed a background check to determine if any additional contact information could be obtained, but had no success identifying any next of kin. Counsel made immediate efforts to contact Plaintiff’s next of kin using the known contact information for Plaintiff, including the phone number on file and Plaintiff’s last known home address, after being informed on his death. However, counsel has not received a response from these efforts in the ten days which have passed since they were informed of Plaintiff’s death. Accordingly, counsel has not been able to identify

¹ Defendants did not issue an amended deficiency notice regarding Plaintiff’s amended PFS and therefore is presumed to have acquiesced to the submitted PFS as meeting the requirements of PTO 14. *See generally In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation*, 15-md-2666, ECF No. 117 (Pretrial Order No. 14 Regarding Plaintiff Fact Sheet and Service Protocol).

Plaintiff's next of kin² or even determine if there are any surviving next of kin, and therefore is unable to determine whether Plaintiff's next of kin wish to move forward with this case.

CONCLUSION

For the foregoing reasons, undersigned counsel respectfully requests that Plaintiff's claims not be dismissed with prejudice pursuant to Pretrial Order 23 and an additional sixty (60) days be given for counsel to successfully contact next of kin and determine how they wish to proceed.

Dated: December 13, 2018

KENNEDY HODGES, LLP

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² Mr. Crume's obituary is only a few sentences and does not identify any surviving family members. See <http://www.tributes.com/obituary/show/Benjamin-Thomas-Crume-105428043>.